IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re	
INTERCONTINENTAL POLYMERS, INC.,	No. 03-23736
	Chapter 11
Debtor.	

M E M O R A N D U M

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This case is before the court on the motions of the debtor Intercontinental Polymers Inc. for additional findings of fact and conclusions of law and for order directing entry of final judgment; SouthTrust Bank's motions to alter or amend judgment and for a Rule 54(b) certification; and a motion by the United Food and Commercial Workers International Union (the "Union") to compel payment of outstanding vacation pay. For the following reasons, the motions for additional findings and to alter or amend judgment will be granted in part and denied in part; and the motions for a Rule 54(b) certification and the Union's motion to compel will be denied. This is a core proceeding. *See* 28 U.S.C. § 157(b)(A), (B) and (O).

I.

This matter first came before the court on two earlier motions filed by the Union on June 2, 2004, requesting that the debtor's unpaid prepetition obligations for employees' health insurance and vacation pay be designated as administrative expenses. According to the Union's memorandum filed in support of those motions, the debtor failed to pay health insurance benefits totaling $587,367.33 owed in varying amounts to an estimated 140 employees and $13,321.71 in vacation pay owed to an estimated 65 hourly employees. The Union's motions to designate these unpaid obligations as administrative expenses were premised on 11 U.S.C. § 1113(f) which provides that "[n]o provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with provisions of this section." The Union asserted that unless the prepetition obligations were paid, the debtor would have unilaterally terminated or altered the parties' collective bargaining agreement in violation of § 1113(f). In support of this proposition, the Union cited *United Steel Workers of Am. v. Unimet Corp. (In re Unimet)*, 842 F.2d 879 (6th Cir. 1998), wherein the Sixth Circuit Court

of Appeals held that under § 1113(f) of the Bankruptcy Code, a debtor employer had to pay certain insurance premiums for its retired employees owed under the parties' collective bargaining agreement regardless of whether the premiums otherwise satisfied the requirements for administrative expenses set forth in 11 U.S.C. § 503.

The Union's two motions were opposed by the debtor, the Official Committee of Unsecured Creditors, and SouthTrust Bank, the debtor's primary secured creditor. All argued in their responses to the motions that the Union's reliance on § 1113(f) and *Unimet* was misplaced, that *Unimet* was distinguishable, and that the other circuits which have since addressed the issue have disagreed with *Unimet*. The debtor additionally opposed the motions on factual grounds, including whether the employees had exceeded required deductibles. At a July 7, 2004 hearing on the Union's motions, counsel for the parties presented no evidence as to the factual disputes, but instead argued the legal merits of the motions, noting that if the court ruled against the Union as a matter of law, the factual disputes would for the most part resolve themselves. At the conclusion of the parties' oral argument, the court read its ruling into the record, concluding that under *Unimet*, the debtor's collective bargaining agreement obligations had to be accorded administrative expense status. In an order entered July 12, 2004, the court granted the Union's motions "as a matter of law," but reserved ruling as to the debtor's liability for any specific employee's claim pending any interlocutory appeal. The order further indicated that if no such appeal were filed, an objection deadline and further hearing would be set as to the claims of specific employees.

The present motions which are before the court all pertain to the July 12, 2004 order. In the debtor's motion filed July 19, 2004, it seeks additional findings of fact and conclusions of law as to whether there has been an assumption by the debtor of its collective bargaining agreement with the Union and

whether the employees' claims are entitled to superpriority status under 11 U.S.C. § 507(b). Also on July 19, 2004, the debtor filed a second motion, requesting pursuant to Fed. R. Civ. P. 54(b) that the court direct entry of final judgment with respect to the July 12 order. SouthTrust Bank filed similar motions on July 21, 2004, seeking not only Rule 54(b) certification, but also alteration or amendment of the July 12 order to include a finding that SouthTrust Bank's lien on substantially all the debtor's assets and potential § 507(b) claim granted by an agreed order entered December 23, 2003, are superior to the Union's claims. And lastly, in the Union's current motion filed on July 28, 2004, the Union seeks immediate payment by the debtor of the claims for outstanding vacation pay, based on the court's conclusion, as set forth in the July 12, 2004 order, that such pay is entitled to administrative expense status as a matter of law. Each of these motions will be addressed below.

II.

As noted, both the debtor and SouthTrust Bank request a ruling as to the priority status of the debtor's obligations under the collective bargaining agreement.[1] The debtor asks that the court "make a

[1]Although they essentially seek the same relief, the debtor and SouthTrust Bank's motions are based on different procedural rules. The debtor's request for additional findings of fact and conclusions of law is premised on Fed. R. Civ. P. 52(b), which provides that "[o]n a party's motion filed not later than 10 days after entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly...." "The purpose of a motion to amend is to clarify essential findings of fact and legal conclusions and 'to correct manifest errors of law or fact.'" *Cent. Fid. Bank v. Cooper (In re Cooper)*, 116 B.R. 469, 471 (Bankr. E.D. Va. 1990)(quoting *Fontenot v. Mesa Petro. Co.*, 791 F.2d 1207, 1219 (5th Cir. 1986)). *See also Matyas v. Feddish*, 4 F.R.D. 385, 386 (M.D. Pa. 1945)("The purpose of Rule 52 is to clarify matters for the appellate court's better understanding of the basis of the decision of the trial court.").

SouthTrust Bank's motion is based on Fed. R. Civ. P. 59(e), made applicable to bankruptcy cases

(continued...)

finding whether or not the administrative expense claims of the Union are entitled to super priority status under Section 507(b) of the Bankruptcy Code or whether such claims are only entitled to administrative expense parity with other administrative claimants of the bankruptcy estate." Similarly, SouthTrust Bank asks for an express finding that its lien is superior to the Union's claims for payment. SouthTrust also observes that an agreed order entered December 23, 2003, incorporated a settlement agreement providing, "If at any time during the pendency of the Debtor's bankruptcy case [SouthTrust] Bank is undersecured, any and all amounts by which the Bank is undersecured, then Bank shall be entitled to and shall receive a priority claim pursuant to 11 U.S.C. § 507(b) of the Bankruptcy Code." As such, SouthTrust asks the court to find that any § 507(b) priority claim which it may hold is also superior to the collective bargaining agreement obligations owed to the Union. SouthTrust states that resolution of these issues is necessary in order for any party to propose a plan of reorganization since a plan must provide for payment in full of all allowed administrative claims unless an administrative claimant agrees otherwise.

In responses filed July 22, and July 28, 2004, the Union opposes both the debtor and SouthTrust Bank's motions, stating that there is no need for additional rulings by this court on these issues in the absence of the filing of a plan of reorganization. The Union notes that the debtor has not proposed a reorganization

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[1](...continued)
by Fed. R. Bankr. P. 9023. This rule allows a court to consider a "motion to alter or amend a judgment." The Sixth Circuit Court of Appeals has held that "a court should grant such a motion only 'if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice.'" *Keenan v. Bagley*, 262 F. Supp.2d 826, 830 (N.D. Ohio 2003) (quoting *GenCorp, Inc. v. Am. Int'l Underwriters Co.*, 178 F.3d 804, 834 (6th Cir. 1999)). The rule "is not designed to give an unhappy litigant an opportunity to relitigate matters already decided, nor is it a substitute for an appeal." *Sherwood v. Royal Ins. Co. of Am.*, 290 F. Supp.2d 856, 858 (N.D. Ohio 2003)(citing *Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998)). For purposes of ruling on the parties' motions, the court finds little difference between the two standards.

plan and cites communication from debtor's counsel which indicates that the only plan contemplated by the debtor is one of liquidation. The Union goes on to argue, however, that *Unimet* dictates that employees' claims for health insurance and vacation benefits arising out of an unrejected collective bargaining agreement are superpriority claims, with status over and above claims arising under any other Code provision.

As to the Union's assertion that additional findings as to priority are unnecessary, it must be observed that in the Union's original motions which began this line of inquiry, the Union not only requested designation of the unpaid obligations as administrative expenses, but also a finding that the employees' claims "be granted administrative priority over and above the priorities set forth in § 503 and § 507." This court failed to answer the priority question in its bench ruling on July 7, 2004, and finds it appropriate to remedy this failure at this time, especially since it is a question which must be addressed before any distribution to creditors may occur.

In the July 7, 2004 bench ruling, this court concluded that it was bound by *Unimet*, which it interpreted as compelling the designation of the debtor's collective bargaining agreement obligations as administrative expenses. The Sixth Circuit Court of Appeals did not expressly consider in *Unimet* the priority of claims held by retirees in that case, only that the lower court erred in denying the application to pay the retirees' insurance premiums as administrative expenses pursuant to 11 U.S.C. § 503(b), regardless of whether the premiums otherwise met administrative expense criteria. The fact that the Sixth Circuit did not specifically rule on the priority issue when it granted collectively-bargained benefits administrative expense status renders the former question the more difficult one for this court. *Cf. In re Colorado Springs Symphony Orchestra Ass'n*, 308 B.R. 508, 514 (Bankr. D. Colo. 2004)("It is all well and good to know that the Debtor-in-Possession remained fully bound to the terms of the CSSO CBA post-petition

until the date the Court approved rejection of the agreement. But, the more difficult question is to determine the payment priority that the Court should assign to the Debtor-in Possession's obligations under the CSSO CBA ... that remained unperformed or unpaid as of the time the rejection of the agreement was approved.").

At one end of the spectrum, the court finds no authority for the proposition that SouthTrust Bank's first priority lien position on the majority of the debtor's assets is in jeopardy. The determination that a claim is entitled to payment as an administrative expense in no way constitutes the grant or award of a property interest in any asset of the debtor. The only court which has addressed this issue in a reported decision agrees. *See In re Armstrong Store Fixtures Corp.*, 135 B.R. 18, 23 (Bankr. W.D. Pa. 1992).[2]

On the other hand, the majority of courts which have interpreted *Unimet* for the purpose of determining the priority of collective bargaining agreement obligations vis-a-vis other administrative expenses

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[2]As stated by the *Armstrong Store* court on this subject:

> [M]ovants at times appear to suggest that their claims also take priority over NBD's first priority secured claim, and that their claims are to be paid ahead of NBD out of the proceeds realized from the sales of the property in which NBD has a first priority security interest.
>
> Movants have provided no authority in support of this proposition. They have cited to no Code provisions or case law. Instead, movants appear to rely on the same premise upon which they relied in support of their other contention. Specifically, movants appear to be arguing that § 1113(f), on its own terms, mandates that employee claims arising from a violation of § 1113(f) take precedence over all other claims, including those of holders of first priority secured interests in estate property.
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> It is not necessary at this time for the court to divine the rationale for movants' contention. The proposition is patently untenable.... The highest status which can be accorded to such claims is as administrative claims. Neither § 507(a) nor any Code provision accords such claims a priority greater than that enjoyed by a first priority secured claimant.

In re Armstrong Store Fixtures Corp., 135 B.R. at 23.

have concluded that *Unimet* establishes a superpriority. The district court in *United Steelworkers of America, AFL-CIO, CLC v. Ohio Corrugating Co.*, 1991 WL 213850 (N.D. Ohio, Jan. 3, 1991), observed:

> *Unimet* does not explicitly state that claims under section 1113 should be given "super-priority" over claims under section 507. Yet, by requiring that the retiree benefits of the unrejected collective bargaining agreement be paid, despite failing to qualify as an administrative expense, *Unimet*, in effect, established a super-priority over section 507. The wording of section 1113(f) supports this conclusion: "No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provision of this section."

Id. at *4. *See also In re Typocraft Co.*, 229 B.R. 685, 690-91 (Bankr. E.D. Mich. 1999)("In effect *Unimet*, *Acorn* [*Int'l Union v. Acorn Bldg. Components, Inc. (In re Acorn Bldg. Components, Inc.)*, 170 B.R. 317 (E.D. Mich. 1994)], and *Ohio Corrugating*, say that § 1113(f) creates its own priority as to covered CBA obligations...."); *Eagle, Inc. v. Local No. 537*, 198 B.R. 637, 639 (D. Mass.1996) ("[S]ection 1113(f) creates a super-priority for all pre-petition as well as post-petition payments due under a collective bargaining agreement which, in effect, trumps 11 U.S.C. § 507."); *Metro. Distrib. Servs., Inc. v. Local 1532 OPEIU (In re Golden Distribs. Servs., Inc.)*, 152 B.R. 35, 37 (S.D.N.Y.1992) (holding that § 1113(f) creates a super-priority for severance and vacation pay claims arising under a collective bargaining agreement); *In re Arlene's Sportswear, Inc.*, 140 B.R. 25, 26-28 (Bankr. D. Mass.1992)(affirmatively answering the question of whether "§1113(f) override[s] all of the provisions of the Bankruptcy Code which would otherwise determine the priority of claims and the manner in which they are paid?"). *But see In re Roth Am., Inc.*, 975 F.2d 949, 957 n.10 (3rd Cir. 1992)("We note that it is not clear whether the Sixth Circuit in *Unimet* determined what *priority* should be accorded the union's claim; the court only reversed the judgment of the district court 'to the extent that it held that 11 U.S.C. §1113

does not protect the interests of retirees.'")(quoting *In re Unimet*, 842 F.2d at 886).

This court agrees that the most logical reading of *Unimet* is that the debtor's obligations arising out of the parties' collective bargaining agreement are not subject to the priority scheme of § 507. The *Unimet* court found it irrelevant that such an obligation did not qualify as an administrative expense; instead, the only relevant inquiry was whether the obligation was a requirement of an unrejected collective bargaining agreement. If so, § 1113(f) dictates that the debtor "cannot escape its obligations in this regard merely because the requirements of section 503 arguably have not been satisfied." *In re Unimet*, 842 F.2d at 884.

In some respects, the court finds § 1113(f) analogous to 11 U.S.C. § 365(d)(3) which directs the trustee or debtor-in-possession to "timely perform all the obligations of the debtor ... arising ... under any unexpired lease of nonresidential real property... notwithstanding section 503(b)(1) of this title."[3] "A majority of courts interpret section 365(d)(3) as granting the lessor automatic administrative expense treatment for the amount called for by the lease." 3 COLLIER ON BANKRUPTCY § 365.03[3][f][ii] (15th ed. rev. 2004). And, although the courts are divided, some have held that the lessor is entitled to a superpriority for the rent during the period covered by section § 365(d)(3). *Id*. (citing, *inter alia, In re Telesphere Communications, Inc.*, 148 B.R. 525, 531 (Bankr. N.D. Ill. 1992)(holding that the grant of superpriority status is implicit in the plain language of § 365(d)(3)). The district court in *Inland's Monthly Income Fund, L.P. v. Duckwall-ALCO Stores, Inc. (In re Duckwall-ALCO Stores, Inc.)*, 150 B.R. 965 (D. Kan. 1993), explained that it was a misnomer to characterize lease obligations arising under § 365(d)(3) as administrative expenses since they are not subject to the requirements of § 503 for payment of administrative

[3]Subsection (d)(10) of § 365 sets forth a similar timely performance directive, outside the parameters § 503(b)(1). *See* 11 U.S.C. § 365(d)(10).

expenses. "Lease obligations payable under § 365(d)(3) are distinct from § 503 administrative expenses and constitute a unique category under the Bankruptcy Code." *Id.* at 971 n.10. Finding the command of § 365(d)(3) to be "clear and unambiguous," the court held that it was "in full agreement with the courts that have held, based on the clear language of § 365(d)(3), that it creates obligations with priority over § 503 administrative expenses." *Id. See also In re Brennick*, 178 B.R. 305, 308 (Bankr. D. Mass. 1995)("The command [set forth in § 365(d)(3) must be obeyed even though to do so grants a priority as practical matter."). *But see In re Microvideo Learning Sys, Inc.*, 232 B.R. 602, 605-06 (Bankr. S.D.N.Y. 1999)(holding that no superpriority created and collecting cases addressing the issue).

Similarly, the Sixth Circuit Court of Appeals ruling in *Unimet* was not based on any administrative expense criteria, but rather the court's adherence to a strict and literal interpretation of § 1113(f), which, in the court's words, "unequivocally prohibits the employer from *unilaterally* modifying *any provision* of the collective bargaining agreement." *In re Unimet*, 842 F.2d at 884 (emphasis in original). To subject a payment required by § 1113(f) to the strictures of any Code provision, including § 507's priority scheme, would appear to run afoul of the express holding of *Unimet*. Accordingly, this court believes that it is compelled by *Unimet* to conclude that the debtor's obligations arising under the collective bargaining agreement are superior to those of other administrative expense claimants, including any § 507(b) claim by SouthTrust Bank.

The second request in the debtor's motion for additional findings is:

> That the Court make a finding whether or not, as claimed by the Union, there was an assumption of the Collective Bargaining Agreement between the Union and the Debtor by virtue of the Court's approval on two occasions of the post-petition modifications of such Collective Bargaining Agreement.

In this request, the debtor is referring to an argument that the Union made in its original two motions. The Union noted in those two motions that on two occasions post-petition, agreed orders were entered in this case making interim changes in the parties' collective bargaining agreement and providing that any further modification or change to that agreement would be subject to subsequent action upon motion. The Union argued in the memorandum accompanying the motions that as a result of these two orders, the collective bargaining agreement has been assumed by the debtor. This court did not address this contention in its July 7, 2004 bench ruling or the July 12, 2004 order. The Union now objects to the debtor's request for additional findings on this point, arguing in its response to the debtor's motion that "the issue of whether there was ... an assumption of the Collective Bargaining Agreement is irrelevant to the status which should be accorded the health/vacation claims."

The court agrees that resolution of the question of whether the parties' collective bargaining agreement has been assumed by the debtor is irrelevant to the Union's original motions seeking payment of the employees' health and vacation claims. The Sixth Circuit's decision in *Unimet* on behalf of the union in that case did not turn on whether that collective bargaining agreement had been assumed, either implicitly or expressly, by the debtor. In fact, no argument was even made in that case that the debtor had assumed the agreement.[4] Instead, the only relevant question in the *Unimet* court's view was whether rejection in accordance with the requirements of § 1113(b) had been accomplished. If not and until such time, the debtor had to comply with the collective bargaining agreement. *See In re Unimet*, 842 F.2d at 882 (court

[4]The debtor in *Unimet* had filed a motion to reject the collective bargaining agreement but the motion was denied because the debtor had failed to meet its burden of proof under 11 U.S.C. § 1113(b). *In re Unimet,* 842 F.2d at 880.

adopting union's argument that "the debtor-in-possession ... was required to comply with *all* provisions of the collective bargaining agreement *unless and until rejection was permitted by the court*")(emphasis in original). Accordingly, the debtor's motion for additional findings of fact and conclusions of law on this issue will be denied.[5]

III.

Next, both the debtor and SouthTrust Bank request that the July 12 order be certified as final by this court for the purpose of appeal pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, as incorporated by Fed. R. Bankr. P. 7054(a). That rule, entitled "Judgment Upon Multiple Claims or Involving Multiple Parties," provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

The debtor states that the July 12 order "represents fewer than all claims of the parties with respect to the issues raised by the Union's motions and there is no just reason for delay or entry of final judgment

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[5]SouthTrust Bank notes in its motion to alter or amend that it continues to contest the court's decision on the merits but that rather than making further argument on this issue, it will appeal this court's ruling. To the extent that SouthTrust Bank's motion requests alteration of this court's original ruling that *Unimet* mandates administrative expense status for the Union's claims arising out of the parties' collective bargaining agreement, the motion will be denied.

on the issues decided by the order ... because the decision ... presents essentially a question of law that can easily be separated from the factual issues remaining on the Union's motions."

As with respect to their motions for additional findings and to alter or amend, both the debtor and SouthTrust Bank argue that certification is necessary in order for a plan of reorganization to be formulated.

"Although Rule 54(b) provides a means by which a ... court may release for immediate appeal final decisions resolving 'one or more but fewer than all of the claims or parties' in a multiple-claim or multiple-party action, Fed. R. Civ. P. 54(b), ... it does not empower the ... court to "treat as 'final' that which is not 'final'...." *Corrosioneering, Inc. v. Thyssen Environmental Systems, Inc.*, 807 F.2d 1279, 1282 (6th Cir. 1986)(quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 437 (1956)). "[A]t least one claim or the rights of at least one party must be finally decided." 10 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2656 (3rd ed. 2004). Accordingly, a court "must first determine that it is dealing with a 'final judgment.' It must be a 'judgment' in the sense that it is a decision upon a cognizable claim for relief, and it must be 'final' in the sense that it is 'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'" *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980)(quoting *Mackey*, 351 U.S. at 436).

The Union's original motions certainly involve multiple parties, each asserting individual claims for payment. It is also true that the court has determined as a matter of law that the claims are entitled to administrative expense status. However, no one claim has been fully or finally adjudicated by this court. The July 12 order expressly reserved ruling on "any factual dispute between the parties as to the debtor's liability for a specific employee's claim for payment of prepetition health insurance benefits or unpaid vacation." "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for

the court to do but execute the judgment." 10 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2656 (3rd ed. 2004). The July 12 order which neither establishes the debtor's liability for nor fixes the amount of any claim can in no sense of the word be considered "final." *See, e.g., Clark v. First State Bank (In re Beauty View, Inc.)*, 841 F.2d 524 (3rd Cir. 1988)("Nor is an order final when it upholds liability, but not fix the amount of damages."). Accordingly, the motions of the debtor and SouthTrust for a Rule 54(b) certification must be denied.

IV.

Lastly, the court turns to the Union's motion to compel payment of $13,321.71 in outstanding vacation pay allegedly due to an estimated 65 employees of the debtor. As previously stated, the Union's motion is based on this court's conclusion as incorporated in the July 12 order that any such allowed claims have administrative expense status. However, as has been noted, this court did not resolve any factual objection that the debtor has as to any of these claims. As a result, any motion to compel payment at this time of vacation pay is premature.

V.

Contemporaneously with the filing of this memorandum opinion, the court will enter an order reflecting the rulings of the court discussed above. The order will provide for granting the debtor's motion for additional findings as to the relative priority of the debtor's obligations arising under the collective bargaining agreement but denying the motion to the extent it seeks a finding as to the assumption status of that agreement. SouthTrust Bank's motion to alter or amend will be granted in part to provide that the

collective bargaining agreement obligations are inferior to SouthTrust Bank's first priority lien. In all other respects, SouthTrust Bank's motion to alter or amend will be denied; the debtor's and SouthTrust Bank's motion for a Rule 54(b) certification will be denied; and the Union's motion to compel payment of outstanding vacation pay will be denied .

FILED: August 6, 2004

BY THE COURT

/s/

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE